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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, *Appellant*,
vs.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, *et al.*, *Appellees*. } No. 470

LOS ANGELES & SALT LAKE RAILROAD COMPANY, a corporation, *Appellant*,
vs.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, *et al.*, *Appellees*. } No. 471

SOUTHERN PACIFIC COMPANY, a corporation, and SOUTHERN PACIFIC RAILROAD COMPANY, a corporation, *Appellants*,
vs.
RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, *et al.*, *Appellees*. } No. 472

APPELLANTS' REPLY TO BRIEF OF AMICI CURIAE.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, *Appellant*, *vs.* RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, *et al.*, *Appellees.*	No. 740
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APPELLANTS' REPLY TO BRIEF OF AMICI CURIAE.

THE RAILROADS REST THEIR CASE UPON QUESTIONS OF LAW.

The argument of Amici Curiae (p. 76 of their brief) that "In view of the failure of the appellant

carriers to cite evidence in the Record in support of their claims, we believe that we are justified in insisting (what is the fact) that on controverted issues of fact the Record is in each instance against the contentions of the carriers'' is not well founded.

With the object of simplifying the questions of law presented for determination no specifications of error relating to the insufficiency of the evidence to sustain the State Commission's findings and order have been made. No effort has been made or will be made to argue controverted questions of fact. It has been deemed unnecessary to do more than direct the Court's attention to the important facts upon which the State Commission's decision and order are predicated, which are contained in the testimony of witnesses appearing for the State Commission and as set forth in the Commission's findings, conclusions and orders and stated in the opinions of the State Court and this Court.

I.

THE STATE COMMISSION'S ORDER IS IN CONTRAVENTION OF AND REPUGNANT TO THE COMMERCE CLAUSE AND INCONSISTENT AND IN CONFLICT WITH THE POWERS VESTED IN THE INTERSTATE COMMERCE COMMISSION.

In answer to the argument on behalf of the Railroads relating to this question (Appellants' Brief pp. 27-61) counsel for Amici Curiae contend that Congress did not intend to deprive and did not deprive the states of jurisdiction to require the construction and operation of a union passenger station and necessary incidents at new sites (B. pp. 43, *et seq.*).

Reliance is placed upon the rule announced by this Court in *Savage v. Jones,* 225 U. S. 501, 533 and similar cases cited by counsel for Amici Curiae at pages 43-46 of their brief.

In *Savage v. Jones, supra,* it was held that a state law enacted under its reserved power, regulating the sale and requiring the publication of the ingredients of concentrated commercial stock food is not inconsistent with or repugnant to the Federal Food and Drugs Act, the object of which is to prevent adulteration and misbranding and to keep adulterated and misbranded articles out of interstate commerce.

In *M. K. & T. v. Harris,* 234 U. S. 412, it was held that a Texas statute allowing a reasonable attorney's fee as a part of the cost in case of recoverable contested claims for loss on interstate shipments, was a police regulation designed to promote the prompt payment of small but well-founded claims and to discourage unnecessary litigation with respect to them.

In *Sligh v. Kirkwood,* 237 U. S. 52, it was held that a Florida statute making it unlawful to sell or ship any citrus fruits which are immature or otherwise unfit for consumption is not invalid even when applied to shipments in interstate commerce.

The arguments of opposing counsel have been anticipated in the Joint Brief of Appellants (pp. 42-54) and need not be repeated.

The cases at bar are clearly distinguishable from the case of *Savage v. Jones* and cases sustaining the rule therein announced. In these cases the State of California is attempting to compel interstate railroads to provide instrumentalities or facilities of Interstate commerce. It is endeavoring to regu-

late in a field, the control over which has been delegated to Congress. When a state attempts to act in a field which has been committed to Congress, a different rule from that followed in *Savage v. Jones* is applicable. When Congress manifests an intention to occupy that field, state regulation is rendered inoperative, regardless of whether the state law is in conflict with the Federal law or not. Under these circumstances, the rule followed in

Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 604,
New York Central R. Co. v. Winfield, 244 U. S. 147, 153,
Penn. R. Co. v. Public Service Com., 250 U. S. 566, 569,
Mo. Pac. R. Co. v. Stroud, 267 U. S. 404, 408,
Mo. Pacific R. Co. v. Porter, 273 U. S. 341, 345.
C. W. R. R. & N. Co. v. Washington, 270 U. S. 87.
St. L. I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702.

is applicable. Under these decisions a state cannot add to the regulation by Congress when Congress has indicated its intention of occupying the field. Whatever regulation Congress may prescribe it impliedly excludes any other regulation.

International Shoe Co. v. Pinkus, 278 U. S. 261, cited in the brief of Amici Curiae on page 46, follows this rule.

The Intention of Congress as to Union Passenger Stations.

Counsel endeavor to fortify their argument by referring to the proceedings before Congress at the time the Transportation Act was under consideration.

At page 48 of their brief a statement of Chairman Esch is quoted presumably for the purpose of indicating that Congress did not intend to confer power upon the Interstate Commerce Commission to require the construction of a union passenger station at a new site, involving an extension of main line tracks or any of the essential incidents of such station. Nothing contained in the quotation indicates that it was the intention of Congress to permit the states to exercise the power of requiring the construction of such interstate union stations. The proposed amendment discussed by Chairman Esch dealt with the joint use of depots and did not relate to the construction of union stations at new sites involving an extension of lines to reach them. Mr. Esch coauthor of the bill stated:

> "There is, however, a provision in this bill providing for the joint use of terminals * * * But that power will be exercised, I have no doubt, mainly in connection with the terminals in the large cities and in the congested centers. Due to the prohibitive cost of land, it is necessary to get a greater use out of *existing terminals* by giving to some regulatory authority, like the Interstate Commerce Commission, the right to order the joint use of such terminals, but that that power should be exercised as to depots in small communities is not contemplated. * * *" (Italics ours.)

The quotation is from Appellees Brief, p. 30. The census of 1930 shows that Los Angeles is the fifth city of the United States in population.

This Court in the *First Los Angeles Case* has construed the Transportation Act in accordance with the statement made by Mr. Esch. In that case it

held that Congress had conferred upon the Federal Commission jurisdiction over a union station at a new site where such union station involves an extension of lines and a rearrangement of tracks; but that the State may still direct the construction of merely local union stations at railroad crossings or connections. In its decision in the *First Los Angeles Case,* this Court was not unmindful of paragraph (17) of Section 1. It referred to that paragraph and said that "only a lawful order of the Interstate Commerce Commission would raise a question of the power of a State Commission in such cases." In other words, the States still have power to order railroads to establish local union stations at railroad crossings or connections, provided the order of the State Commission is not inconsistent with any lawful order of the Interstate Commerce Commission.

The decision of the Supreme Court of North Carolina in *North Carolina Corporation Com. v. Southern Ry. Co.,* 185 N. C. 435, 459, cited by counsel at page 50 of their brief, is in accordance with the decision of this Court in the *First Los Angeles Case.* The cited case merely concerned the validity of an order requiring two intersecting railroads to maintain a union station at the junction point.

At page 53 of the City's brief it is stated that if the argument of the carriers that Congress has so occupied the field of regulation of union passenger stations upon a new site as to preclude further action by the States is sound, "the result will be that no public authority either State or Federal, any longer has the authority, heretofore clearly possessed by the states, of requiring the construction of union passenger station on new sites, however urgently the

public convenience and necessity may require such construction." This is referred to as a "startling proposition." Even if this result will follow it is no reason why the Court should disregard established legal principles to prevent such a result. This is an argument that should be addressed to Congress rather than to the Court.

CONGRESS DID NOT INTEND TO CIRCUMSCRIBE THE POWER OF ITS COMMISSION AND REQUIRE IT TO SHARE ITS AUTHORITY WITH A STATE COMMISSION.

Counsel argue (B. p. 59):

> "The authority of the Interstate Commerce Commission is purely *factual* and *permissive*. It *finds* and *certifies* to important facts in connection with the proposed union station construction. The function of the California Railroad Commission, on the other hand, is *mandatory* in character. The Commission *requires* that the union passenger station be constructed." (Italics theirs.)

This argument has been anticipated at pages 54-61 of Joint Brief for Appellants, and the case of *Missouri Pacific R. Co. v. Stroud*, 267 U. S. 404, 408 therein cited, sustains the contention of the Railroads that there cannot be a divided authority between the nation and the states relating to the regulation of interstate commerce.

It is true that, as contended by counsel "the authority of the Interstate Commerce Commission is purely factual and permissive. It finds and certifies to important facts in connection with the proposed union station construction."

This is all the power Congress deemed necessary to confide to its Commission. By vesting the Commission with such authority Congress occupied the field and thereby superseded the state law.

In *Second Los Angeles Case, supra,* p. 70, this Court held:

> "When the interest of a great city in its improvements is to be prompted entirely at the expense of railroads that enter it, Congress would be expected to hesitate before it would change discretionary leave for the erection of such stations into positive command."

But according to counsel Congress has provided so that its Commission may evade the direct responsibility for such expenditures by giving discretionary leave over protest of the railroads and thereupon a state commission although charged with no responsibility to Congress or to the nation, may at once convert that discretionary leave into a command.

In this connection counsel argue (B. p. 59) that the Interstate Commerce Commission on the one hand and the California Railroad Commission on the other are performing distinct and separate functions and that "there is nothing unlawful or even unusual in the performance by these two governmental agencies of these distinct and separate functions." It is stated that this is one of the many instances in which two public authorities acting lawfully each within its own jurisdiction must take favorable action before a certain result will be effected.

Where railroads apply to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing them to construct or extend a main line of railroad no reference is made to the

requirements of local state or municipal laws permitting the construction of the proposed line over, across or upon highways or streets and the necessary authority to cross streets and highways is granted in an entirely separate proceeding with which the Interstate Commerce Commission has no concern. This does not mean that the regulation of the railroad is divided between the United States and the state or city.

The case of *Cummings v. Harper*, 188 U. S. 410, cited at page 61 of Brief of Amici Curiae does not sustain the contention that Congress contemplated that the Federal and State Commissions might exercise concurrent jurisdiction in establishing new interstate union stations at new sites. In that case citizens of Illinois brought suit against the City of Chicago for the purpose of restraining it from interfering with the construction of a dock in front of certain lands owned by the plaintiffs. The dock was being constructed without the consent of the City. The River and Harbor Act of March 3, 1899, (30 Statutes at Large, 1151, Chapter 425, Sec. 9), which provides for the construction of structures over or in navigable waters of the United States, contains the proviso "that such structures may be built under authority of the Legislature of a State across rivers and other waterways, the navigable portions of which lie wholly within the limits of a single State, provided the location and the plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced." The Court merely held, in accordance with the provisions of the Act, that the construction of the dock in ques-

tion depends "upon the concurrent or joint assent of both the National Government and the state government."

The cited case suggests that if Congress had intended that the construction of union stations for interstate carriers, involving extensive extensions of line, should depend upon the concurrent action of the State and Federal authorities, it would have used words to indicate that intention just as in the River and Harbor Act of March 3, 1899, it clearly indicated that the erection of a structure in a navigable river within the limits of a State should depend upon the concurrent or joint assent of both the National Government and the state government.

The cases of *Montgomery v. Portland,* 190 U. S. 106; *State of Wisconsin v. State of Illinois,* 278 U. S. 367, 412 cited by Counsel are equally inapplicable.

The general statements contained at pages 61, 62 of Brief of Amici Curiae do not answer the arguments found at pages 54-61 of Appellants' Brief, that the order of the State Commission cannot be supported or rendered valid by certificates issued by the Interstate Commerce Commission, that there cannot be a divided authority between the Federal and State Commissions, that neither the Federal nor State Commissions have been vested with power to give effect to orders entered by the other. Counsel's statement that "the authority of the Interstate Commerce Commission is purely *factual* and *permissive,*" sustains our position.

II.

THE CERTIFICATE ISSUED BY THE INTERSTATE COMMERCE COMMISSION IS VOID.

Counsel for Amici Curiae, at pages 64 *et seq.* of their brief, advance two principal arguments in support of their contention that the certificate issued by the Interstate Commerce Commission is valid.

One is that if the Interstate Commerce Commission has jurisdiction to issue such certificates only upon application of the carriers it follows "that in union passenger station cases before state commissions the carriers can always defeat the public authorities by the simple device of failing to make application to the Interstate Commerce Commission for the necessary certificates." This argument is not sound. The stated result would follow, but unauthorized certificates should not be validated because of such result. The authority of the Commission to issue certificates is to be found only in the Act of Congress. If Congress has not vested the Interstate Commerce Commission with such power it is not the function of this Court to confer authority upon the Commission to issue such certificates in adversary proceedings or to hold unauthorized certificates valid because of the results which might follow from the failure of Congress to vest the Commission with such authority.

The second argument is that this Court in the *First Los Angeles Station Case,* with knowledge that the City of Los Angeles was before the Interstate Commerce Commission in an adversary proceeding, "pointed out with much care and detail the authority of the Interstate Commerce Commission to issue the certificates." It is argued from this that "this

Court would not have taken the pains to make its careful review if, in fact, the Interstate Commerce Commission has no such power in an adversary proceeding." The answer to this argument is that the question of the power of the Interstate Commerce Commission to issue certificates of public convenience and necessity in adversary proceedings was not before this Court for adjudication in the *First Los Angeles Station Case,* and this Court did not attempt to pass upon that question in that case. In the *Second Los Angeles Case,* this Court, in referring to the *First Los Angeles Case,* said (p. 71):

> "It is quite true that we made references in the opinion to a case foreshadowed in the hypothetical certificates of the Commission in the building of a union station. Such references had, however, not the slightest significance in respect to who could or should build the station, or whence its cost should be defrayed. It was as far as possible from the purpose of the Court in its opinion to indicate its views of the powers which the Commission could exercise adversely to the carriers in compulsory proceedings. They were not before the Court for adjudication."

The argument advanced by Counsel that "the California Railroad Commission considered the certificates to be valid and upon the filing of the same" (which we may state parenthetically was without prior notice to the Railroads) (R. p. 4) "denied the petitions of the carriers for rehearing," and that the State Court held that "the certificates on their face are proper and sufficient and comply with the decision of the Supreme Court of the United States; the Railroad Commission is so considering them, as

did the Interstate Commerce Commission," can not prevail in view of the authorities cited in support of the Railroad's argument found at pages 63 to 69 of their initial brief.

In several instances counsel make the statement that the Interstate Commerce Commission has issued "the certificates *specified by this Court* in the *First Los Angeles Union Station Case.*" (B. pp. 54, 63, 67, 69.) It is also stated that "the Interstate Commerce Commission complied completely with the *requirements* as to *findings* and *certificates* theretofore *specified by this Court*" (B. p. 63), and that the Interstate Commerce Commission "in the matter of findings and certificates, acted in exact accord with the decision of this Court in the *First Los Angeles Union Station Case.*" (B. p. 67) (Italics ours)

The certificate issued by the Interstate Commerce Commission which is described by counsel as those "specified by this Court" will be found at pages 153 and 154 of the Record. The certificate is also contained in appendix 3 of Brief of Amici Curiae and is complete as there set forth with the exception that the "note" is misleading as is shown by the Record because the certificate is followed by two orders, one denying the application of the City and State for an order requiring the construction of a union passenger station and the other dismissing the joint application of Southern Pacific Company and Southern Pacific Railroad Company, Finance Docket 3556.

This Court did not "specify" any certificates. In referring to the certificates which the Commission is authorized to issue under paragraphs (18)-(21), Section 1, the Court stated:

> "Such a certificate is, we think, necessary in the construction of a new interstate union station which involves a substantial and expensive extension of the main tracks or lines of interstate carriers who theretofore have maintained separate terminals." (*First Los Angeles Case, supra,* p. 344)

Again, at page 346 of this decision the Court in referring to the differences between a local union station and the station proposed in this case, stated:

> "They come within paragraphs (18) to (21) of Section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission."

These are the only two instances in which the Court refers to certificates in *First Los Angeles Case, supra.*

At the time this Court rendered the first decision in the case cited the Interstate Commerce Commission had not passed upon the questions which had been submitted to it in the proceeding brought by the City and State.

The Interstate Commerce Commission had rendered its decisions in the *First Federal Commission Decision* and *Second Federal Commission Decision* at the time the mandamus proceedings reached this Court by certiorari. This Court in referring to *First Los Angeles Case* stated:

> "the relocation of tracks, which was incidental to the proposed union passenger station, required a certificate of approval by the Interstate Commerce Commission * * *" (p. 61)

and held

> "The Commission, in order to facilitate dispatch and in the disposition of the case * * * made hypothetical certificates, * * *"

which the Court "summarized". (*Second Los Angeles Case, supra,* p. 62)

Again, at page 71 of its opinion this Court referred to "hypothetical certificates" of the Commission.

These are the only instances in which this Court has referred to the Commission's certificate (except in instances reciting the requirements of Paragraph 18 of Sec. 1 and of Sec. 20). It has done no more than "summarize" the certificate which the Commission issued but has nowhere and at no time "specified" what certificate should be issued or under what circumstances.

THE RAILROADS ARE ENTITLED IN THESE PROCEEDINGS TO QUESTION THE VALIDITY OF THE CERTIFICATE ISSUED BY THE INTERSTATE COMMERCE COMMISSION.

Beginning at page 68 of the brief filed on behalf of the City counsel argue that the validity of the certificate cannot be attacked collaterally. Counsel contend that because the Southern Pacific and the Salt Lake Companies applied for certificates of public convenience and necessity relating to the construction of new lines and the abandonment of existing lines necessary to carry into effect *their* plan for the joint use of Southern Pacific's station, the Commission is vested with power to determine the questions presented by the applications filed by the State Commis-

sion and the City for certificates requiring and authorizing the Railroads to extend and abandon lines necessarily involved in the construction and operation of the union station ordered by the Commission. The argument is made that "under the circumstances, it would seem to be elemental that the decision of the Interstate Commerce Commission can not be attacked collaterally." (Amici Curiae Brief p. 69)

The applications covering the plan of the Railroads have no relation to the applications made by the State Commission and the City. The fact that the Railroads' applications were consolidated for hearing with the complaint that had been filed by the City does not operate to vest the Commission with authority to issue certificates upon applications filed by the City and State which relate to an entirely separate enterprise. (*Second Los Angeles Case, supra*, p. 62)

The certificates applied for by the Southern Pacific and Salt Lake Companies were denied July 6, 1925, as shown by City of Los Angeles Exhibit No. 5 certified to this Court. (R. p. 7, Item 54-b)

The application of Southern Pacific Company and Southern Pacific Railroad Company, Finance Docket No. 3556, sought authority to abandon main line passenger and freight service on Alameda Street. This application was withdrawn and abandoned before the Interstate Commerce Commission rendered its decision in *Second Federal Commission Decision* and was dismissed by the Commission's order. (R. pp. 144, 7)

The Railroads Were not Entitled to Maintain an Action in the District Court.

The argument proceeds upon the theory that "the carriers could have filed in the appropriate

District Court of the United States a bill for an order to set aside the Commission's certificates" and authorities are cited in support of the contention that where the action of the Interstate Commerce Commission is affirmative in character the carriers could and should have instituted proceedings to enjoin the action taken by the Commission.

Counsel conclude their argument by stating:

> "While we respectfully insist on the point that the carriers can not raise this issue collaterally, as they are seeking to do, we believe that the Court will not find it necessary to pass on the point for the reason that the findings and certificates issued by the Interstate Commerce Commission are lawful and valid." (B. p. 74)

The concession is made inferentially that this Court may pass on this point if the certificates issued by the Commission are not lawful and valid.

The Railroads insist, as was argued in their opening brief, that (1) they were not entitled to maintain an action in the United States District Court either under the jurisdiction vested in the District Courts by the Urgent Deficiencies Act of October 22, 1913, or under such court's general equity jurisdiction; (2) that even though the carriers were entitled to institute such an action they are nevertheless entitled to question the sufficiency of the certificate collaterally because it is void.

The Interstate Commerce Commission held, in *Second Federal Commission Decision, supra,* p. 497:

> "All issues of fact having been considered and concluded by our original report and this report

> on further hearing, nothing remains for us but to deny the application of the city of Los Angeles and the intervener, the Railroad Commission of the State of California, for a final order herein requiring the construction of a station as found in the public interest; but in lieu thereof to issue an appropriate certificate of public convenience and necessity conformable to the findings herein;"

In conformity with this conclusion the Commission issued its certificate, but *no order was entered requiring* the Railroads to take any action with respect thereto.

The certificate issued is affirmative only in the sense that it is permissive, but, as stated, does not require the Railroads to take any action.

The orders denying the applications of the City and State to "require the construction of a union passenger station and terminal" and denying Southern Pacific Company's application which was withdrawn and dismissed are negative. *Second Federal Commission Decision* (R. p. 154).

The certificate issued by the Commission does not attempt to adjudicate rights sought to be exercised by the Railroads nor does it enjoin the Railroads to do or refrain from doing anything whatsoever.

This case is distinguishable from the *Chicago Junction Case,* 264 U. S. 258, cited by counsel for Amici Curiae (p. 71 of their brief) and from the *Colorado Case,* 271 U. S. 253, upon which counsel also rely. In the *Chicago Junction Case* this Court stated (p. 262).

> "The order (that is of the Commission) did not provide for the issue of a certificate of public convenience and necessity. * * * In this Court counsel for all the defendants stated that the order was entered solely under paragraph 2 of Section 5. We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of Section 1, or rights thereunder."

A vital distinction must be made between the *Colorado Case* and the case at bar, for the reason that in the *Colorado Case* the certificate was issued upon application of the interested carrier which sought to abandon a portion of its railroad in the state and upon the issuance of the certificate the carrier was entitled and intended to proceed to dismantle its line of railroad. The certificate in the *Colorado Case* was valid upon its face, having been issued upon application of the carrier pursuant to the provisions of paragraphs (18)-(20) of Section 1, whereas in the case at bar the certificate was issued in adversary proceedings over the objections and against the protests of the carriers which throughout the proceedings contended that the Interstate Commerce Commission did not possess the constitutional or statutory power to issue the certificate in accordance with the prayer of the complaint.

In all of the cases cited by counsel an attempt was made to enjoin action which the Railroads proposed to take under certificates of public convenience and necessity for which the Railroads had applied and the attack in each instance was made by some party other than the railroad to whom the certificates were issued. In none of the cases cited were certificates issued in adversary proceedings. In fact, this is the

only instance we can find where the Interstate Commerce Commission has undertaken to issue a certificate in such proceedings.

How could the Railroads bring an action to enjoin the issuance of the certificate? What allegations could be specified in a complaint to support an injunction? The Railroads were not injured by the mere issuance of a certificate *permitting* them to do certain things. The certificate did not command them to take any action. It did not deny them any right. It did not subject them to any liability, civil or criminal for failure to avail themselves of the permission to extend or abandon lines.

The rights of the Railroads were not affected by the issuance of the certificate and could not be affected until an effort was made to compel the Railroads to do the things which the certificate purports to permit them to do. Had the Railroads undertaken to enjoin the issuance of the certificate they would have been confronted with an argument founded upon well recognized principles that the Interstate Commerce Commission had not required them to do the things specified in the certificate and had made no threat to compel the Railroads to perform the things which the Interstate Commerce Commission held they might lawfully do and that they, therefore, could not legally complain of any threatened act affecting their property or their rights.

Counsel argue (B. p. 59):

> "The authority of the Interstate Commerce Commission is purely *factual* and *permissive*. It *finds* and *certifies* to important facts in connection with the proposed union station construction. * * *" (Italics theirs)

Counsel for Appellees (B. p. 28) characterize the Federal Commission's power as

> "the limited 'supervisory' jurisdiction of the Interstate Commerce Commission which it possesses over the matter of the construction of union stations * * *"

If the power of the Interstate Commerce Commission is thus limited and circumscribed it is as stated by this Court in *United States v. Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299, 310, "the exercise solely of the function of investigation" and the cases at bar are as stated in Appellants' joint Brief controlled in this particular by the case cited.

Counsel argue (B. p. 59):

> "The function of the California Railroad Commission, on the other hand, is *mandatory* in character. The Commission *requires* that the union passenger station be constructed." (Italics theirs)

It was not until the State Commission filed in its archives a certified copy of the certificate and undertook to make its order effective by denying appellants' applications for rehearing, thereby converting the Interstate Commerce Commission's permission into a command, that the carriers' rights were adversely affected. These rights the carriers sought to protect and enforce by the proceeding instituted in the State Court now under review.

In support of the argument that the Railroads have a right to test the Interstate Commerce Commission's decision by a proceeding in the United States District Court, counsel, at page 74 of their brief,

quote from the decision of the State Supreme Court, "We think this question is not properly raised here." This isolated sentence is misleading and when read alone may create the impression that the State Court was referring to questions relating to the validity or invalidity of the certificate. The two sentences preceding the sentence above quoted read:

> "It is contended that because the order recites that it shall become effective upon the promulgation by the Interstate Commerce Commission of an order issuing and granting proper and sufficient certificates or orders covering and authorizing the constructions, extensions and abandonments authorized in said order of the Railroad Commission and that the issuance of such order or orders by the Interstate Commerce Commission shall be a condition precedent to the effectiveness of the order of the Railroad Commission, the order is void for uncertainty. Petitioners ask who is to say whether or not such certificates as might be made by the Interstate Commerce Commission are proper and sufficient certificates. *We think this question is not properly raised here.*"

The question answered was not that of the power of the Interstate Commerce Commission to issue certificates, but the question whether the certificate which it had issued was such as the State Commission had in mind in making its order.

The Commission's Certificate May Be Attacked Collaterally.

Assuming, solely for the purpose of argument, that the Railroads were entitled to seek injunctive relief in the United States District Court correcting the In-

terstate Commerce Commission's action, it does not follow that the Railroads are not entitled to question the validity of the certificate in this proceeding. If we are correct in our contention that Congress has vested its Commission with the power to issue certificates such as are involved in this case only upon the application of the carriers, it may be collaterally attacked because it is void.

Where the Commission makes an order which it has no power to make, the order is necessarily void and not merely voidable.

Illinois Central R. Co. v. Pub. Utilities Com., 245 U. S. 493, 506.

A judgment rendered in excess of jurisdiction is void, not merely voidable and is subject to collateral attack.

Re Terry, 128 U. S. 289, 305.

Although a Court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted it by the law of its organization, its decree is void and subject to collateral attack.

United States v. Walker, 109 U. S. 258, 266.

In *United States v. Ward* (C. C. A. 8th Circuit), 257 Fed. 372, 376, it was held that the allowance of compensation in bankruptcy proceedings by the District Court "other or different, or in addition to, that provided by the bankruptcy law for services,

clearly imposed upon a referee by law, is beyond its jurisdiction and void, and its judgment may be attacked collaterally.

See also *Ritchie v. Sayers*, 100 Fed. 520, 530.

The Interstate Commerce Commission having been vested with no power to issue certificates of public convenience and necessity in the adversary proceedings which it entertained, the certificate issued is void and not merely voidable, is without any effect, and the Railroads are entitled to raise this question at any time and in any proceeding regardless of whether or not that they might question the validity of the certificate by invoking the jurisdiction of the United States District Courts. None of the authorities cited by counsel in their brief are to the contrary.

III.

The State Commission's Order Requires the Joint Use of the Terminal Main Line Tracks Which Are Now Separately Owned, and the State Commission Has Failed to Provide Compensation For Their Use by Other Carriers.

Counsel in the argument found at pages 107 *et seq.* of their brief impliedly admit that no compensation has been provided for the joint use of property owned by the carriers individually and seek to evade the issue by contending that the Commission's order does not "require the joint use by one or more carriers of existing tracks and property of the other carriers."

The Railroads believe that the references to the record found at page 94 of their initial brief conclu-

sively establish the fact that the Commission's order required such joint use of the existing tracks and property owned by one another, but as counsel has argued that the State Commission's order does not require any joint use of existing carrier property it becomes necessary to refer to the testimony introduced by the State Commission's witnesses and to the Commission's conclusions, findings, and order. Counsel endeavor to support their argument by calling attention to the fact that "the directory and mandatory portions of the Railroad Commission's order" do not specifically require the joint use of any existing property. Counsel admit, however, that

> "It is true that among the *findings* of the Railroad Commission is one (6) on the subject of such joint use of existing carrier properties 'as may be incidental, and necessary or convenient, to the proper operation of any such union passenger station * * *'" (R. 132.)

The order of the State Commission (R. 131) consists of certain findings of fact and the mandatory provisions requiring certain things to be done. To determine what the Commission's order requires the carriers to do, the mandatory provisions of the order must be construed in connection with the findings of fact *contained in the order.* The first mandatory provision (R. 133) requires the Railroads to construct a union passenger station in the City of Los Angeles within a defined area, together with such tracks, connections, and all other terminal facilities and additions, extensions, etc., as may be reasonably necessary and incidental to the use of union passenger station "in substantial compliance with the plan outlined in Commission's Exhibit 4-b herein."

Finding No. 6 included in the order (R. 132) is "that the use by any defendant steam carriers of so much of the terminal main-line track or tracks of any of the other defendant steam carriers in the City of Los Angeles, as may be incidental, necessary or convenient, to the proper operation of any such union passenger stations as defendants or any of them, in accordance with our order herein, may construct and establish in that portion of said City described in paragraph (3) above, is in the public interest, and is practicable, without, in our opinion, impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business."

This finding undoubtedly contemplates that the railroads must necessarily use the tracks of each other to reach the proposed union station.

In the "hypothetical certificates" set forth by the Interstate Commerce Commission in *First Federal Commission Decision*, 100 I. C. C. 421, 459, 460, the Commission found it necessary, in order to fully conform to the *First State Commission Decision*, to include finding No. 6, which it substantially identical with finding number 6 of the State Commission above quoted.

The certificate issued by the Interstate Commerce Commission in *Second Federal Commission Decision*, 142 I. C. C. 489 (R. pp. 153-4) recites:

> "That the present and future public convenience and necessity * * * require the use by any defendant steam carriers of so much of the terminal main-line track or tracks of any of the other defendant steam carriers in the city of Los Angeles, Calif., as may be incidental, and neces-

> sary or convenient, to the proper operation of such union passenger station and terminal." (R. pp. 153-54.)

This Court in summarizing these "hypothetical certificates" (*Second Los Angeles Case, supra,* p. 63) stated:

> "The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business."

It thus appears that the Interstate Commerce Commission considered that the "essential incidents" of the construction and operation of a union station ordered by the State Commission involves the joint use by the several Railroads of one owner's tracks and terminal facilities.

The Commission's decisions, orders and exhibits likewise make it certain that the joint use by the Railroads of one another's facilities is necessarily involved in carrying the order into effect.

Since the union station and other facilities must be constructed "in substantial compliance with the plan outlined in Commission's Exhibit 4-b herein," and since under the Commission's plan, as outlined in Exhibit 4-b, it will be necessary for the carriers to use each others' tracks, the Commission's order definitely requires the Railroads to make use of each others' tracks.

It likewise appears from the Railroad Commission's Exhibit No. 6 (R. p. 227) that the Commis-

sion's order requires the construction of connections between main lines of interstate carriers and the joint use of main lines of such carriers. Counsel contend that this exhibit is not a part of the order and that the station must be constructed only in substantial compliance with the Commission's Exhibit 4-b (R. p. 267).

Commission's Exhibit No. 6 is a "Key Map of Plaza Plan" and shows in greater detail what is required by the Commission's Exhibit 4-b.

This is confirmed by Commission's Exhibit 13 (R. p. 231) which is an estimate of expenditures and new money required for the "Plaza Plan." "AD" on Exhibit 6 shows connections between the Southern Pacific, Salt Lake and Santa Fe lines in order to permit the joint use of tracks to reach the union station, "MCF2." Item 3 of Commission's Exhibit 13, "New Trackage and Connections" shows "SP-SL-SF connections at East and West banks of the River at Hobart.

Counsel seek to avoid this issue by arguing, at pages 108-110 of their brief, that the Commission's order affords the carriers the alternative of jointly using one another's terminal tracks or constructing their own main tracks to reach the designated sites and in support thereof cite the statement by this Court in *First Los Angeles Station Case, supra,* 340.

The Interstate Commerce Commission accepted the estimate of the State Commission that the cost of the union station complete, including all trackage, would approximate $10,000,000.00. This was based upon the theory that the carriers would make joint use of their trackage to reach the union station in accordance with the estimates made by the Commission's

engineers of such construction. No estimate of cost of building independent lines into the station was made by the State Commission or by the Interstate Commerce Commission.

The authorities cited in Appellants' Opening Brief considered in the light of these facts sustain their contention that their constitutional rights have been impaired by failure of the State Commission to provide compensation for the use of their railroad properties by one another.

IV(a) (b).

The argument advanced by counsel for the City (pp. 110-123 of their brief) in an effort to show that in ordering the construction of a union station the State Commission was not acting under the guise of exercising its power of eliminating grade crossings, that the order did not require Southern Pacific Company to join in constructing a union station for the purpose of eliminating grade crossings and providing the other two railroads with adequate passenger depots, and the Santa Fe and Salt Lake lines are not required to join in the construction of the union station for the purpose of eliminating crossings on lines of the Southern Pacific Company, has been anticipated and answered, pages 103-117 of Joint Brief for Appellants, and requires no further comment.

CONCLUSION.

This Court may take judicial notice of the fact that earnings of the railroads have been constantly decreasing and that motor vehicles publicly and privately owned have diverted a large volume of the

passenger traffic from the railroads. If the expenses of conducting the passenger business are increased by the erection of expensive terminals a burden will be placed upon interstate commerce both freight and passenger and the railroads will be handicapped in carrying into effect the mandate of Congress to operate their properties efficiently and economically in order to provide the people of the United States with an adequate transportation system.

Congress in its wisdom provided that existing terminal facilities should be utilized by the carriers jointly and purposely vested its Commission with adequate power to accomplish the unification of terminals with the deliberate intention of divesting state commissions of the power to require carriers to make unnecessary expenditures for such purposes.

It is respectfully submitted that the judgment of the State Court should be reversed and that Court directed to annul the State Commission's order.

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